UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. ENRIQUE AVALOS-BARRIGA, Defendant.	CIV. NO. 99 CV 1686 BTM CRIM. NO. 95 CR 973 BTM **ORDER DENYING § 2255 PETITION TO VACATE DEFENDANT'S CONVICTION AND SENTENCE AND GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY** (Filed Jul. 6, 2000)

On October 10, 1996, defendant Enrique Avalos-Barriga ("Avalos-Barriga") was convicted of conspiracy to posses cocaine with intent to distribute and conducting a career criminal enterprise through his involvement in a Mexican drug trafficking ring. He was sentenced to life imprisonment. Avalos-Barriga challenges his conviction and sentence under 28 U.S.C. § 2255, alleging that (1) his trial counsel was ineffective at various stages of the proceedings, (2) his counsel had a conflict of interest, and (3) he was denied counsel of his choice. For the reasons expressed below. Avalos-Barriga's petition is DENIED.

BACKGROUND

The complex factual background of this case was developed during pre-trial, trial, and post-trial proceedings. Further, the issues on collateral review have been briefed comprehensively by counsel. The Court conducted an evidentiary hearing on May 25, 2000, at which time Jan Edward Ronis ("Ronis"), Avalos-Barriga's trial counsel, was sworn and testified, and evidence was admitted.[1] At the Court's request, counsel for petitioner and respondent submitted supplemental briefs, which the Court has reviewed in consideration of this Order. Because significant time and judicial resources have already been expended in developing and presenting the facts of this case, the Court will reiterate facts only when necessary to resolution of the issues on review.

DISCUSSION

I. Ineffective Assistance of Counsel

Avalos-Barriga claims that his trial counsel, Ronis, was ineffective at various stages of the proceedings. In the seminal case of *Strickland v. Washington*, 466 U.S. 668

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[1] At the evidentiary hearing, the Court heard testimony on Avalos-Barriga's claims that Ronis was ineffective in seeking a plea agreement, had conflicts of interest that prevented his adequate representation, and interfered with his right to counsel of his choice. *See United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988) (concluding that a petitioner is entitled to an evidentiary hearing on a habeas petition if, accepting the truth of the allegations, the petitioner could prevail on an ineffective assistance of counsel claim). The trial and sentencing errors raised by Avalos-Barriga have been considered on the papers.

(1984), the Supreme Court set forth the standard to apply when considering claims of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient *and* that the deficient performance prejudiced the defense. *See id.* at 687. In other words, "there [must be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A highly deferential standard is employed when scrutinizing counsel's performance, such that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Id.* at 689. To ensure that the Court reaches each allegation raised by Avalos-Barriga, it will categorize the ineffective assistance claims as follows: (A) plea agreement; (B) trial errors; (C) sentencing errors.

A. Plea agreement

Avalos-Barriga claims that he desired to enter into a plea agreement with the government but was precluded from doing so by Ronis. On the morning of trial, a co-defendant, Jose Reynoso-Gonzalez ("Reynoso-Gonzalez"), pled guilty to obtain a 151-month sentence offered by the government, leaving Avalos-Barriga as the only defendant to stand trial. Avalos-Barriga contends that when the government offered him a 20-year sentence in exchange for a guilty plea, he would have taken the offer but for Ronis dissuading him from doing so. Because he followed Ronis's allegedly deficient advice to reject the offer and he was unaware of the risks in going

to trial, Avalos-Barriga insists that he has been prejudiced by having to serve a life sentence.

During the evidentary hearing, Ronis testified that all of the remaining defendants and their attorneys came up with settlement offers on the morning of trial to present to the government. The government accepted everyone's offer, except Avalos-Barriga's 12-year offer, from which it countered with a 20-year offer. Ronis presented this offer to Avalos-Barriga and, because of the disparity between the offer and the counteroffer, Ronis sought a continuance of the trial. The trial was continued and Ronis described his conversations with Avalos-Barriga as follows:

> I presented the offer to him . . . it was so much beyond what we had offered to them initially, it was a lot to absorb in a short period of time. . . . From a lawyer's point of view, it was difficult to strongly recommend somebody take a twenty-year sentence in terms of urging it upon a client because Mr. Avalos, as I recall, is about my age, and a twenty-year prison sentence for a person who is of his age and his, as I knew then existing medical condition, was an awful lot, maybe almost a life sentence. So it is not one that you could really push on a client.
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> Although certainly I presented it to him. We talked about all the alternatives, the options, and he made the decision. essentially the decision was, twenty years for me at my age and my health is a life sentence.

Tr. 68. Ronis further testified that early on in the case, he believed the case needed to settle, but Avalos-Barriga was

insistent that he did nothing wrong and would communicate nothing to the government. Tr. 18, 22, 28. Indeed, according to Ronis, Avalos-Barriga wanted to call a meeting with the government simply to explain that he had done nothing wrong. Tr. 22. Because of Avalos-Barriga's unwavering assertions that he was not involved in the conspiracy and would not cooperate with the government, Ronis believed that prior plea negotiations would have been fruitless.

The Court concludes that Ronis's performance, under all of the circumstances, fell within the range of reasonably effective legal counsel. After the defendants negotiated plea agreements with the government. Avalos-Barriga was the only defendant remaining to stand trial. Ronis appropriately sought a continuance, which he obtained, to discuss the government's counter-offer. Ronis presented the offer to Avalos-Barriga, who was aware that he could receive a life sentence. Even if the Court concluded that Ronis's performance in failing to further negotiate a plea agreement was deficient, Avalos-Barriga has offered no evidence to indicate that he would have taken the 20-year offer, no mater who would have brought it to his attention.

The Court notes that the cases cited by Avalos-Barriga in his papers are inapposite. Ronis did not fail to inform Avalos-Barriga of the government's plea offer. *Cf. United States v. Blaylock*, 20 F.3d 1458, 1456 (9th Cir. 1994) (holding that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards). Furthermore, Ronis explained the options available to Avalos-Barriga, who was fully aware of the

potential consequences if he proceeded to trial. *Cf. Alvernaz v. Ratelle*, 831 F.Supp. 790, 792 (S.D. Cal. 1993) (concluding that counsel's failure to advise defendant of the consequences of going to trial was unreasonable under prevailing professional norms). Although Ronis did not engage the government in ongoing plea negotiations, Ronis's actions were well within the "strategy, tactics, and styles" of defense attorneys and do not amount to deficient performance. *See e.g. Aguilar v. Alexander*, 125 F.3d 815, 821 (9th Cir. 1997) (holding that counsel's failure to aggressively pursue plea negotiations did not amount to deficient performance but was within the realm of strategy, tactics, and styles of defense attorneys).

B. Trial errors

Avalos-Barriga makes several challenges to decisions made by Ronis during trial. He claims that the effect of the following trial errors rose to ineffective assistance of counsel: (1) Ronis failed to investigate and present to the court judicial orders from Mexico that exonerated Avalos-Barriga from involvement with the 7.3 tons of cocaine; (2) Ronis failed to object to the government's opening statement, which referred to Avalos-Barriga as "the leader" and "kingpin"of the drug organization; (3) Ronis failed to present testimony that the amount stolen from the house was one million pesos rather than one million dollars; (4) Ronis conceded that two members of the conspiracy took some direction and control from Avalos-Barriga; (5) Ronis failed to challenge the government's arguments on elements other than the supervisory element of the continuing criminal enterprise charge; (6) Ronis failed to object to

several jury instructions; (7) Ronis failed to effectively impeach witnesses; (8) Ronis failed to emphasize testimony favorable to Avalos-Barriga in his closing argument; and (9) Ronis failed to make a motion to cure defects in the indictment.

Counsel's tactical decisions at trial are given great deference in ineffective assistance of counsel claims. *See Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000); *see also People of the Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir.1984) (per curiam) (holding that a tactical decision by counsel with which the defendant disagrees cannot be the basis of a claim of ineffective assistance of counsel). As such, any decision by counsel must meet only objectively reasonable standards. *See Dows*, 211 F.3d at 487.

Avalos-Barriga claims that Ronis's failure to present evidence of Mexican documents that exonerated him from involvement in the 7.3 ton cocaine seizure constitutes ineffective assistance of counsel. The documents allegedly indicate that an arrest warrant for Avalos-Barriga based on the seizure of 7.3 tons of cocaine had been denied due to insufficient evidence. Even if these documents were not admitted into evidence, Avalos-Barriga insists that they should have been used to impeach the testimony of Ali Arista-Chavez's ("Arista-Chavez"), the prosecutor from the Mexican Attorney General's Office who testified about the seizure of the 7.3 tons of cocaine and the search of the warehouse leased to Avalos-Barriga. During direct examination of Arista-Chavez, the government attempted – but was unable – to present evidence that the 7.3 tons of cocaine seized in Tecate was destined for the warehouse in Tijuana leased by Avalos-Barriga. As

Ronis falls within the purview of trial tactics and strategy. The facts of the case were complex and the trial spanned six days. Taped conversations established the amount of drugs, the series of offenses, and the income received form the transactions. It was within Ronis's discretion to focus on the arguments that a jury would find most compelling and that a jury could easily assimilate in light of the complicated testimony.

Avalos-Barriga further insists that Ronis failed to object to various elements of the jury instruction on the continuing criminal enterprise count. The court needs not reach the merits of the jury instructions, however, because Avalos-Barriga is unable to demonstrate prejudice. *See Strickland*, 465 U.S. at 697 (concluding that if no prejudice results from alleged deficiencies in performance, a court can dismiss an ineffective assistance of counsel claim without determining whether counsel's performance was deficient). Avalos-Barriga was convicted of both conspiracy to possess cocaine and a continuing criminal enterprise. Because the Honorable Leland C. Nielsen sentenced Avalos-Barriga to two life sentences, one on each count, Avalos-Barriga is unable to demonstrate prejudice even if the jury instruction was improper. For this reason, the court must deny Avalos-Barriga's claim of ineffective assistance of counsel for failure to object to the jury instructions.

Avalos-Barriga's last three challenges can be dealt with summarily. His claims that Ronis failed to effectively impeach witnesses and failed to emphasize favorable testimony during closing arguments are not supported by the facts. Indeed, Ronis's impeachment strategies and closing argument followed the same theme as his theory

at trial: Avalos-Barriga was not the main boss, and government informants were testifying against him to receive personal concessions. Avalos-Barriga's final contention that Ronis failed to make a motion to cure the indictment is likewise without merit. As the arguments focus solely on the continuing criminal enterprise count, Avalos-Barriga is unable to demonstrate prejudice even if Ronis's actions were ineffective. *See Strickland*, 466 U.S. at 697.

In sum, the Court has considered the challenges to Ronis's actions during trial, the government's opposition and reasons supporting each of Ronis's decisions, and Avalos-Barriga's traverse to the government's response. After careful examination, the Court concludes that every exception raised by Avalos-Barriga is without merit. The Court will not second-guess Ronis's decisions made during trial, all of which fall within the wide range of professionally competent assistance. *See Ainsworth v. Calderon*, 138 F.3d 787, 791 (9th Cir. 1998).

C. Sentencing errors

Avalos-Barriga insists that Ronis's failure to challenge the disparate, more lenient treatment that Reynosos-Gonzalez received at sentencing amounts to ineffective assistance of counsel. Reynosos-Gonzalez pled guilty before trial and received a 13-year sentence for his involvement in the conspiracy. Avalos-Barriga received a life sentence after trial. Both defendants were sentenced by Judge Nielsen.

Avalos-Barriga's argument must fail because it is based on the false premise that the charges against

Reynoso-Gonzalez and Avalos-Barriga were the same. Unlike Avalos-Barriga, Reynoso-Gonzalez was never charged with a continuing criminal enterprise. Indeed, Avalos-Barriga and Reynoso-Gonzalez received disparate sentences because of the government's assessment of their comparative roles, ages, and strength of the evidence. The government proceeded on a theory that Avalos-Barriga was the leader of the drug operation who gave orders to others, including Reynoso-Gonzalez. This theory is supported by the plea agreements offered to Reynoso-Gonzalez and Avalos-Barriga; Reynoso-Gonzalez was offered a plea of 13-years, which he elected to take, and Avalos-Barriga was offered a plea of 20-years, which he turned down. When Judge Nielsen sentenced Avalos-Barriga, he was intimately familiar with the facts of the case, the plea agreements, and the sentences given to the other defendants. Avalos-Barriga suffered no prejudice, and his claim for ineffective assistance of counsel in the sentencing phase fails.

II. Conflict of interest

Avalos-Barriga claims that Ronis had a conflict of interest in his representation of Sylvia Lopez-Juarez, Avalos-Barriga's common law wife, and in his partnership with Michael Pancer, counsel for Reynoso-Gonzalez. To succeed on a conflict of interest claim, Avalos-Barriga must demonstrate an actual conflict, rather than a potential or speculative conflict. *See United States v. Allen*, 831 F.2d 1487, 1495 (9th Cir. 1987). Once an actual conflict is established, prejudice is presumed. *See id.*

First, Avalos-Barriga claims that Ronis simultaneously represented Avalos-Barriga in his case and his common law wife, Lopez-Juarez, in a different case brought in Texas. During the hearing, Ronis testified that the extent of his involvement in Lopez-Juarez's case was meeting with the lawyer in Texas who represented Lopez-Juarez and discussing the case. Tr. 58-59. According to Ronis, "Mr. Avalos was extremely concerned about her welfare." Tr. 58. Ronis did not make appearances on behalf of Lopez-Juarez, participate in strategizing, or receive any fees for representing Lopez-Juarez or referring Lopez-Juarez to the Texas lawyer. Because Avalos-Barriga's and Lopez-Juarez's cases were related, Ronis and the lawyer in Texas exchanged discovery documents and discussed the case. Tr. 61-64. Avalos-Barriga has failed to present any facts to refute the testimony of Ronis and demonstrate that a conflict of interest with regard to Lopez-Juarez existed.

Second, Avalos-Barriga contends that a conflict of interest existed with Michael Pancer, who represented co-defendant Reynoso-Gonzalez and who Avalos-Barriga believed was in partnership with Ronis. Pancer was associated with Reynoso-Gonzalez's representation as local counsel to assist Reynoso-Gonzalez's trial counsel, James Blancarte from Los Angeles. Tr. 12. For apparent financial reasons, Pancer never formally associated with the case and, in fact, Blancarte represented Reynoso-Gonzalez on the day of trial when Reynoso-Gonzalez pled guilty. Tr. 12, 14. Further, Ronis and Pancer were not law partners, nor did Ronis indicate to Avalos-Barriga that they were partners. Tr. 12-13. Other than a joint ownership interest in a building that Ronis and Pancer occupy, no conflict of

interest between the two existed. Tr. 12. In sum, Avalos-Barriga is unable to demonstrate any actual conflict of interest in Ronis's involvement with either Lopez-Juarez or Pancer.

III. Choice of counsel

Avalos-Barriga insists that he was deprived of counsel of his choice because he wanted to retain attorney Bernard G. Skomal but was prevented from doing so because of false and misleading statements made by Ronis. Specifically, Avalos-Barriga claims that Ronis told him that if he retained Skomal, he would be perceived as a cooperator because Skomal was essentially a "tool of the government." The Sixth Amendment grants a criminal defendant effective control over the conduct of his defense. *See United States v. Wheat,* 486 U.S. 153, 159 (1988). The essential aim of the amendment, however, is "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.*

The crux of Avalos-Barriga's arguments centers on the alleged deceptive remarks by Ronis that Skomal worked for the government and, if Avalos-Barriga retained Skomal, he would be suspected as an informant of the government. Avalos-Barriga contends that his family understood these comments as a threat on their lives if Avalos-Barriga chose to retain Skomal. During the evidentiary hearing, Ronis explained that when he learned that Skomal had visited Avalos-Barriga to discuss representing him for the remainder of the case, he became

upset because Skomal had created problems in his relationships with other clients in other cases. Tr. 21. In a series of letters between Ronis and Skomal, it is abundantly clear that both attorneys understood that Skomal was meeting with Avalos-Barriga, Skomal had not formally taken the case, Ronis was not pleased with these meetings, and Ronis believed Skomal was providing reckless predictions to Avalos-Barriga. Ronis testified that he did not tell Avalos-Barriga that Skomal worked for the government. Tr. 22. Rather, Ronis explained:

> Mr. Avalos had told me that Mr. Skomal had told him that this was a relatively simple case, and that [Skomal] could get [Avalos-Barriga] a very good resolution, by that something under ten years, as he had in other cases.
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> And I, in an effort to defend my own representation of him, I said, look, that very well may be correct that Mr. Skomal, if he has gotten those kinds of resolutions for other people in other cases, it is more than likely because he cooperated those clients. And that certainly is a way to reduce your sentence, if you like, but I don't want you to think that he is just going to walk in and get you something less than ten years without that.

Tr. 22. Avalos-Barriga explained to Ronis that he was unwilling to cooperate. Tr. 55. He failed to indicate to Ronis or the court, however, that he no longer desired Ronis to represent him.

In an affidavit provided after the evidentiary hearing, Skomal stated that in the middle of the trial, Avalos-Barriga called him "in a desperate state" to tell him that he wanted to accept the 20-year deal. Skomal telephoned

government counsel, who indicated that the 20-year offer was no longer available. At this time, neither Skomal nor Avalos-Barriga approached Ronis or the court to indicate Avalos-Barriga's unwillingness to proceed with Ronis for the remainder of trial.

Avalos-Barriga's choice of counsel guarantee cannot encompass a silent aspiration to change counsel. Avalos-Barriga did not terminate Ronis even though he was clearly aware of his choice to do so. Indeed, in Avalos-Barriga's sworn declaration, he explains that after the unfavorable jury verdict and four days before his sentencing, he gave Skomal a partial retainer to take over his case "after Ronis finished with me." Ronis represented Avalos-Barriga at sentencing and his representation was terminated one day later. Avalos-Barriga's belated assertion that he had wished to change counsel is insufficient to sustain a claim for denial of his choice of counsel.

CONCLUSION

After a comprehensive review of the papers filed in this matter and in light of the testimony presented during the evidentiary hearing, the Court rejects Avalos-Barriga's claims of ineffective assistance of counsel, conflict of interest, and denial of counsel of his choice. Avalos-Barriga's § 2255 petition is therefore DENIED. The Court grants Avalos-Barriga a certificate of appealability for the ineffective assistance of counsel claims that relate to trial errors only. The Court denies a certificate of appealability for all other claims discussed in this Order.

IT IS SO ORDERED.

Dated: July 5, 2000

/s/ Barry Ted Moskowit
HONORABLE
BARRY TED MOSKOWIT
United States
District Judge

cc: All counsel of record